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Attorneys for Plaintiff and the Class
Additional Counsel on Signature Page

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARSON PENKAVA, individually and on
Behalf of those similarly situated,

Plaintiff,
v.

YAHOO!, INC.

Defendant.

Civil Action No: 5:12CV03414-LHK

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DECLARATORY
RELIEF, EQUITABLE RELIEF, AND
FOR DAMAGES**

JURY DEMANDED

Dept.: Courtroom 8—4th Floor
Judge: Hon. Lucy H. Koh

1 PLAINTIFF, CARSON PENKAVA (“Plaintiff”), individually and on behalf of the
2 Class described below, bring this action for injunctive relief and statutory damages against
3 Defendant Yahoo!, Inc. (“Yahoo!”), and allege the following:

4 **PARTIES**

5 1. Plaintiff CARSON PENKAVA is and at all times relevant hereto was a resident
6 of Alabama and is over the age of 19 years.

7 2. Plaintiff’s proposed Class is defined as follows:

8 **All United States citizens, excluding California residents and Yahoo! Mail**
9 **subscribers, who have sent an e-mail to a private individual Yahoo! Mail**
10 **subscriber.**

11 3. Yahoo! is a Delaware corporation, whose principal place of business is at 701
12 First Avenue, Sunnyvale, California 94089. Yahoo! has been served and is a party.

13 **JURISDICTION AND VENUE**

14 4. Pursuant to 28 U.S.C. § 1332(d), this Court has original federal diversity
15 jurisdiction given Plaintiff and the Class are residents of states other than California and Yahoo!
16 is a resident of California. The aggregate value of the Class members’ claims exceeds the sum
17 or value of five million dollars (\$5,000,000.00), exclusive of recoverable interest and costs.
18 None of the causes of action stated herein has been assigned or otherwise given to any other
19 court or tribunal. Plaintiff’s claims are not preempted by the Electronic Communications
20 Privacy Act of 1986 (“ECPA”), 18 U.S.C. § 2510 *et seq.*, or other law or federal regulation.

21 5. This Court has general and specific personal jurisdiction over the Defendant
22 because Yahoo! is a resident of California.

23 6. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) because
24 Yahoo! resides in this Judicial District.

25 **NATURE OF SUIT**

26 7. This class action seeks injunctive relief and statutory damages against Yahoo!
27 for its unlawful and wrongful (1) reading or learning of the contents or meaning of Plaintiff’s
28 and Class Members’ communications and, in the alternative, (2) eavesdropping upon or
recording Plaintiff’s and Class Members’ communications in violation of California’s Invasion

1 of Privacy Act (“CIPA”), Cal. Penal Code § 630, *et seq.*

2 8. “The Legislature hereby declares that advances in science and technology have
3 led to the development of new devices and techniques for the purpose of eavesdropping upon
4 private communications and that the invasion of privacy resulting from the continual and
5 increasing use of such devices and techniques has created a serious threat to the free exercise of
6 personal liberties and cannot be tolerated in a free and civilized society.” Cal. Pen. Code § 630.

7 9. Plaintiff and the Class allege that Yahoo!, intentionally and as part of a common
8 practice, reads, scans, analyzes, processes, copies, acquires content from, makes copies of
9 content from, creates data and information from the content to be used in association with
10 content in, or creates data and information from the content to be used apart from content in the
11 e-mails sent by Plaintiff and Class Members from their non-Yahoo! Mail accounts to Yahoo!
12 Mail recipients. Yahoo! performs these actions upon the e-mails sent by Plaintiff and Class
13 Members to Yahoo! Mail recipients in order to read, attempt to read, eavesdrop upon, or to
14 learn the content or meaning of the e-mails. Further, Yahoo! makes copies or records all or part
15 of the e-mails sent by Plaintiff and Class Members to Yahoo! Mail recipients.

16 10. At the time Yahoo! reads, attempts to read, learns the content or meaning of,
17 eavesdrops upon, and records Plaintiff’s and Class Members’ communications, Yahoo! does so
18 without the consent of all parties to the communications.

19 11. In so conducting itself, Yahoo! reads, attempts to read, learns the content or
20 meaning of, eavesdrops upon, and records Plaintiff’s and Class Members’ communications
21 without Plaintiff’s and Class Members’ knowledge, consent, or permission in violation of
22 CIPA. Cal. Penal Code §§ 631, 632, 637 and 637.2. The invasion of privacy by reading,
23 attempting to read, learning the contents or meaning of, eavesdropping upon, and recording of
24 Plaintiff’s and Class Members’ communications to Yahoo! Mail users caused by Yahoo!’s
25 continual and pervasive use of such devices and techniques seriously threatens the free exercise
26 of personal liberties and is contrary to the behavior that the California Legislature has declared
27 should be tolerated in a free and civilized society.

28 ///

1 12. Through CIPA, the California Legislature intends to protect the right of privacy.
2 Cal. Pen. Code § 630, *et seq.* Plaintiff brings this class action in reliance on and in furtherance
3 of the protections afforded by the California Constitution, and California state law and public
4 policy.

5 13. Plaintiff is among the multitude of U.S. residents whose privacy was invaded
6 when Plaintiff's private communications were and continue to be read or, in the alternative,
7 eavesdropped upon by Yahoo!. As a result of Yahoo!'s invasion of Plaintiff's and the Class
8 Members' privacy, Plaintiff and the Class Members have been injured and each has a concrete
9 interest in the outcome of this suit for redress or to stop Yahoo!'s actions. Accordingly,
10 Plaintiff brings this class action against Yahoo! on behalf of Plaintiff and others similarly
11 situated, to obtain injunctive relief and statutory damages as authorized under CIPA.

12 14. Plaintiff has standing to bring this action because (1) he has been injured by
13 Defendant's reading of, attempts to read, learning of the content or meaning of, eavesdropping
14 upon, and recording of communications Plaintiff sent to Yahoo! Mail users, all in violation of
15 the statutory prohibitions enumerated by the California's Invasion of Privacy Act ("CIPA"),
16 Cal. Penal Code § 630, *et seq.*; (2) Plaintiff's injuries are actual in that Plaintiff's privacy has
17 been invaded *via* Yahoo!'s use of devices and techniques that create a serious threat to the free
18 exercise of personal liberties which cannot be tolerated in a free and civilized society as
19 enumerated by the CIPA; (3) the injury is directly attributable to Yahoo!'s processes and
20 devices, and Yahoo! derives a financial windfall from the reading of, attempts to read, learning
21 of the content or meaning of, eavesdropping upon, and recording of communications Plaintiff
22 sent to Yahoo! Mail users; and (4) in the event of a favorable decision, CIPA provides a
23 concrete redress to Plaintiff for his harm.

24 15. Yahoo!'s acts in violation of CIPA resulted from business decisions, practices,
25 and operating policies that were developed, implemented, and utilized in the State of California
26 and which are unlawful and constitute criminal conduct in the state of Yahoo!'s residence and
27 principal business operations center. Yahoo!'s implementation of its business decisions,
28 practices, and standard ongoing policies which violate CIPA occurred in the State of California.

1 Yahoo! profited in the State of California as a result of its repeated and pervasive violations of
2 CIPA. Yahoo!'s wrongful conduct which occurred in the State of California harmed Plaintiff
3 and all Class Members.

4 **STATEMENT OF FACTS**

5 16. Yahoo! operates an e-mail service known as "Yahoo! Mail."

6 17. Plaintiff and the Class Members do not have or maintain personal Yahoo! Mail
7 accounts.

8 18. Plaintiff and the Class Members have sent e-mails to Yahoo! Mail recipients.

9 19. Yahoo! is not an actual or intended recipient of the e-mails sent by Plaintiff and
10 the Class Members to Yahoo! Mail recipients.

11 20. Yahoo! is not a party to Plaintiff's and Class Members' e-mails sent to Yahoo!
12 Mail recipients.

13 21. The actions complained of herein involve Plaintiff's and the Class Members'
14 communications (e-mail) that they have sent to Yahoo! Mail users and Yahoo!'s acts upon those
15 communications while in transit and at the receiving end of the transmissions.

16 22. E-mail sent to Yahoo! Mail users are messages.

17 23. Plaintiff's and Class Members' e-mails sent to Yahoo! Mail recipients are
18 messages.

19 24. E-mail sent to Yahoo! Mail users are communications.

20 25. Plaintiff's and Class Members' e-mails sent to Yahoo! Mail recipients are
21 communications.

22 26. E-mail sent to Yahoo! Mail users are transmitted in defined Internet Message
23 Formats with destination address fields specifying the recipients of the message.

24 27. Plaintiff's and Class Members' e-mails sent to Yahoo! Mail recipients are
25 transmitted in defined Internet Message Formats with destination address fields specifying the
26 recipients of the message.

27 28. Pursuant to the destination address fields, e-mail sent to Yahoo! Mail users are
28 confined to those persons specified as recipients in the destination address fields.

1 29. Pursuant to the destination address fields, Plaintiff's and Class Members' e-mail
2 sent to Yahoo! Mail users are confined to those persons specified as recipients in the destination
3 address fields.

4 30. This case does not involve Yahoo!'s automated scanning of e-mail for spam or
5 virus protection.

6 31. This case involves Yahoo!'s creeping and peeping to learn the content and
7 meaning of e-mail which Yahoo! does separate and apart from the automated scanning of e-mail
8 for spam or virus protection. It is not necessary for Yahoo! to creep and peep and learn the
9 content and meaning of e-mail in order for Yahoo! to conduct its automated scanning of e-mail
10 for spam or virus protection.

11 32. This case involves Yahoo!'s common and uniform practice of reading,
12 attempting to read, scanning, processing, copying, acquiring content of, making copies of
13 content of, creating data from the content of, eavesdropping upon, and recording of e-mails sent
14 by Plaintiff and Class Members from their non-Yahoo! Mail accounts to Yahoo! Mail
15 recipients.

16 33. Yahoo! reads, attempts to read, learns of the content or meaning of, records
17 and/or eavesdrops upon the communications sent by Plaintiff and Class Members to Yahoo!
18 Mail users.

19 34. While Yahoo! itself uses the words "scan" and "analyze" in relation to its
20 activities, Plaintiff alleges Yahoo!'s scanning and analysis amounts to reading, attempting to
21 read, learning of the content or meaning of, recording, and/or eavesdropping upon the
22 communications sent by Plaintiff and Class Members to Yahoo! Mail users.

23 35. To determine or identify "keywords" in Plaintiff's and Class Members' e-mail to
24 Yahoo! Mail users, Yahoo! reads, attempts to read, learns of the content or meaning of, copies,
25 records and/or eavesdrops upon the communications sent by Plaintiff and Class Members to
26 Yahoo! Mail users.

27 36. To determine or identify "patterns" in Plaintiff's and Class Members' e-mail to
28 Yahoo! Mail users, Yahoo! reads, attempts to read, learns of the content or meaning of, copies,

1 records and/or eavesdrops upon the communications sent by Plaintiff and Class Members to
2 Yahoo! Mail users.

3 37. To generate additional information about the e-mail sent by Plaintiff and Class
4 Members to Yahoo! Mail users, Yahoo! reads, attempts to read, learns of the content or
5 meaning of, copies, records, and/or eavesdrops upon the communications sent by Plaintiff and
6 Class Members to Yahoo! Mail users.

7 38. While the e-mails are in transit, Yahoo! scans the e-mails sent by Plaintiff and
8 Class Members to Yahoo! Mail users.

9 39. While the e-mails are in transit, Yahoo! scans the e-mails for “keywords,” and
10 “patterns,” and other content in e-mails sent by Plaintiff and Class Members to Yahoo! Mail
11 users.

12 40. Yahoo! scans the e-mails sent by Plaintiff and Class Members to Yahoo! Mail
13 users by use of one or more machines, instruments, contrivance, amplifying device or recording
14 device.

15 41. No party to Plaintiff’s and Class Members’ e-mail sent to Yahoo! Mail users has
16 consented to Yahoo!’s reading, attempting to read, learning of the content or meaning of,
17 recording, and/or eavesdropping upon the communications sent by Plaintiff and Class Members
18 to Yahoo! Mail users.

19 42. The content and meaning of the e-mails which Plaintiff and Class Members send
20 to Yahoo! Mail users is private and confidential among those persons in the destination address
21 fields. The e-mails sent to Yahoo! Mail users are confined to those persons specified as
22 recipients in the destination address fields and are private communications among that group.

23 43. The content and meaning contained in Plaintiff’s and Class Members’ e-mails
24 which they send to Yahoo! Mail users are only to be learned by those persons specified as
25 recipients in the destination address.

26 44. Plaintiff and the Class Members have all been harmed by Yahoo!’s creeping and
27 peeping upon their emails which violates Plaintiff’s and the Class Members’ privacy rights.

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45. Yahoo!'s activities in California violate Plaintiff's and the Class Members' privacy rights.

CLASS ALLEGATIONS

46. Plaintiff brings this class action, pursuant to Rule 23(a) and (b)(2) and/or (b)(3) of the *Federal Rules of Civil Procedure*, individually and on behalf of all members of the following Class. The Class consists of:

All United States citizens, excluding California residents and Yahoo! Mail subscribers, who have sent an e-mail to a private individual Yahoo! Mail subscriber.

a. Excluded from the class are the following individuals and/or entities:

i. Any and all federal, state, or local governments, including but not limited to their department, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;

ii. Individuals, if any, who timely opt out of this proceeding using the correct protocol for opting out;

iii. Current or former employees of Yahoo!;

iv. Individuals, if any, who have previously settled or compromised claims(s) as identified herein for the class; and

v. Any currently sitting federal judge and/or person within the third degree of consanguinity to any federal judge.

A. Ascertainability

47. The Class is objectively defined.

48. The Class is ascertainable.

49. Upon Court-approved notice, any Class Member who desires to seek actual damages pursuant to Cal. Pen. Code § 637.2(a)(2) may opt-out OR remain in the Class and be bound by the remedies and results sought herein.

B. Numerosity

50. The Class is so numerous that joinder of all members is impracticable.

51. The number of Class Members is in excess of 100 persons.

1 **C. Commonality**

2 52. There are questions of law or fact common to the class. These questions include,
3 but are not limited to, the following:

4 **§ 631 claims**

5 a. Whether Yahoo!, as a corporation, is a “person”?

6 b. Whether Yahoo!, as a corporation, acts through “persons” for whose
7 actions Yahoo! is liable?

8 c. Whether Yahoo! uses a “machine,” “instrument,” “contrivance,” or “in
9 any other manner” to read, attempt to read, or to learn the content or meaning of
10 Plaintiff’s and the Class Members’ e-mails.

11 d. Whether Yahoo! acts willfully when it reads, attempts to read, or learns
12 the content or meaning of Plaintiff’s and Class Members’ e-mails.

13 e. Whether Yahoo! has the consent of all parties to the communication
14 when it reads, attempts to read, or learns the content or meaning of Plaintiff’s and Class
15 Members’ e-mails?

16 f. Does Yahoo!’s scanning, processing, or copying of Plaintiff’s and Class
17 Members’ e-mail amount to Yahoo! reading, attempting to read, or learning the content
18 or meaning of Plaintiff’s and Class Members’ e-mails.

19 g. Do Plaintiff’s and Class Members’ e-mails amount to “any message,
20 report, or communication?”

21 h. At the time Yahoo! reads, attempts to read, or learns the contents or
22 meaning of Plaintiff’s and Class Members’ e-mails, are the e-mails in transit to the
23 Yahoo! Mail recipients?

24 i. At the time Yahoo! reads, attempts to read, or learns the contents or
25 meaning of Plaintiff’s and Class Members’ e-mails, are the e-mails passing over any
26 wire, line, or cable?

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1 **§ 632 claims**

2 a. Whether Yahoo!, as a corporation, is a “person?”

3 b. Whether Yahoo!, as a corporation, acts through “persons” for whose
4 actions Yahoo! is liable?

5 c. Whether Yahoo! intentionally and without the consent of all parties to the
6 communication eavesdrops upon or records Plaintiff’s and Class Members’ e-mails sent
7 to Yahoo! Mail recipients?

8 d. Whether Yahoo! uses any electronic amplifying or recording device to
9 eavesdrop upon Plaintiff’s and Class Members’ e-mails sent to Yahoo! Mail recipients?

10 e. Whether the e-mails sent by Plaintiff and Class Members to Yahoo! Mail
11 recipients are confidential communications?

12 f. Whether the e-mails sent by Plaintiff and Class Members to Yahoo! Mail
13 recipients are carried on among those parties by means of a device not a radio?

14 **§ 637.2 relief**

15 a. Whether Plaintiff and the Class are entitled to preliminary and permanent
16 injunctive relief to halt Yahoo!’s violations?

17 b. Whether Plaintiff and the Class are entitled to appropriate declaratory
18 relief?

19 c. Whether each Plaintiff and each Class Member are entitled to \$5,000 in
20 statutory damages?

21 d. Whether Plaintiff and the Class are entitled to reasonable attorneys’ fees
22 and other litigation costs reasonably incurred?

23 **D. Typicality**

24 53. Plaintiff’s claims are typical of the claims of the Class in that Plaintiff and Class
25 Members sent e-mail to Yahoo! Mail users; Yahoo! read, eavesdropped, or recorded Plaintiff’s
26 and Class Members’ e-mail contents; neither Plaintiff nor the Class Members consented to
27 Yahoo!’s reading, eavesdropping, or recording of their e-mails; and Plaintiff and the Class
28 Members are entitled to declaratory relief, statutory damages, and injunctive relief due to

1 Yahoo!'s conduct.

2 **E. Adequacy of Representation**

3 54. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's
4 interests do not conflict with the interests of the Class Members. Plaintiff's interests, like those
5 of the Class Members, are antagonistic to Yahoo!. Furthermore, Plaintiff has retained
6 competent counsel experienced in class action litigation. Plaintiff's counsel will fairly and
7 adequately protect and represent the interests of the Class.

8 **F. Predominance and Superiority**

9 55. Pursuant to Fed. R. Civ. P. 23(b)(3), questions of law or fact common to the
10 Class Members predominate over any questions affecting only individual members, and that a
11 class action is superior to other available methods for fairly and efficiently adjudicating the
12 controversy.

13 56. Yahoo!'s scanning and processes regarding the e-mails received by Yahoo! Mail
14 users are uniform.

15 57. Yahoo!'s creeping and peeping practices are uniform.

16 58. All disclosures made by Yahoo! to any person are uniform. Accordingly, issues
17 about truthfulness, completeness, ambiguity, and sufficiency of such statements can be
18 uniformly determined.

19 59. A class action is superior to any individual action available.

20 **CAUSES OF ACTION**

21 **VIOLATIONS OF CAL. PENAL CODE § 630, et seq.**

22 **A. Violations of Cal. Penal Code § 631(a)**

23 60. Pursuant to Cal. Penal Code § 7, Yahoo!, as a corporation, is a "person."

24 61. Yahoo! uses a "machine," "instrument," "contrivance," or "in any other manner"
25 to read, attempt to read, or to learn the content or meaning of Plaintiff's and the Class Members'
26 e-mails. The identity and name of the "machine," "instrument," or "contrivance" used by
27 Yahoo! is known by Yahoo! and otherwise unknown by Plaintiff and the Class, but will be
28 revealed through discovery.

62. Yahoo! acts wilfully when it reads, attempts to read, or learns the content or meaning of Plaintiff's and Class Members' e-mails.

63. Yahoo! does not have the consent of all parties to the communication when it reads, attempts to read, or learns the content or meaning of Plaintiff's and Class Members' e-mails.

64. Yahoo!'s scanning, processing, or copying of Plaintiff's and Class Members' e-mail amounts to Yahoo! reading, attempting to read, or learning the content or meaning of Plaintiff's and Class Members' e-mails.

65. Plaintiff's and Class Members' e-mails amount to "any message, report, or communication."

66. At the time Yahoo! reads, attempts to read, or learns the contents or meaning of Plaintiff's and Class Members' e-mails, the e-mails are in transit to the Yahoo! Mail recipients.

67. At the time Yahoo! reads, attempts to read, or learns the contents or meaning of Plaintiff's and Class Members' e-mails, the e-mails are passing over any wire, line, or cable.

B. Violations of Cal. Penal Code § 632

68. Pursuant to Cal. Penal Code §§ 7 and 632(b), Yahoo!, as a corporation, is a "person."

69. Yahoo! intentionally and without the consent of all parties to the communication eavesdrops upon or records Plaintiff's and Class Members' e-mails sent to Yahoo! Mail recipients.

70. Yahoo! uses any electronic amplifying or recording device to eavesdrop upon Plaintiff's and Class Members' e-mails sent to Yahoo! Mail recipients.

71. The e-mails sent by Plaintiff and Class Members to Yahoo! Mail recipients are confidential communications.

72. The e-mails sent by Plaintiff and Class Members to Yahoo! Mail recipients are carried on among those parties by means of a device not a radio.

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C. **Cal. Penal Code § 637.2 Relief**

73. As a result of Yahoo!'s violations of §§ 631 and 632, Plaintiff and the Class are entitled to:

- a. Preliminary and permanent injunctive relief to halt Yahoo!'s violations;
- b. Appropriate declaratory relief;
- c. For each Plaintiff and each Class Member, \$5,000; and
- d. Reasonable attorneys' fees and other litigation costs reasonably incurred.

DEMAND FOR JURY TRIAL

Plaintiff individually and for the Class demands a jury trial on all claims, issues, and requests for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of themselves and all Class members, pray judgment be entered against Defendant and that the Court grant the following:

1. An order certifying the Class and appointing Plaintiff and their Counsel to represent the Class;
2. Judgment against the Defendant for Plaintiff's and the Class Members' asserted causes of action;
3. Appropriate declaratory relief against Defendant;
4. Preliminary and permanent injunctive relief against Defendant;
5. An award of statutory damages to the Plaintiff and the Class, for each, the amount of \$5,000;
6. An award of reasonable attorneys' fees and other litigation costs reasonably incurred; and
7. Any and all other relief to which the Plaintiff and the Class may be entitled.

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Respectfully submitted,

Dated: September 21, 2012

CORY WATSON CROWDER & DEGARIS, P.C.

By: /s/ F. Jerome Tapley

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